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No.

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

FRANK GUZOWSKI, LORRAINE GUZOWSKI, RAYMOND GUZOWSKI, DONALD GUZOWSKI,

Petitioners,

vs.

BERNARD HARTMAN, HERBERT TYNER, EMANUEL J. SEARS, JAMES KAROUB, DETROIT RACING ASSOCIATION, INC. and HAZEL PARK RACING ASSOCIATION, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should petitioners have been granted leave to file a First Amended Complaint to allege facts disclosed by petitioners in discovery, but not actually included in the Complaint, when the disclosed facts demonstrated a clearly meritorious cause of action under the Supreme Court's interpretation of the Sherman Antitrust Act in *United States v. Parke, Davis and Company*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960), and where the inadequacy of the original complaint was never argued by the respondents but was injected *sua sponte* by the District Court into its opinion dismissing the Complaint, and where petitioners promptly asked for leave to amend within days after learning that the District Court was treating respondents' motion as a motion under Fed. R. Civ. P. 12(b)(6) rather than a motion for summary judgment pursuant to Fed. R. Civ. P. 56?

2. Should petitioners have been granted leave to file a First Amended Complaint to clarify the identity of the RICO "enterprise," 18 U.S.C. § 1961(4), when the inadequacy of petitioners' original allegations concerning the "enterprise" was never argued by respondents nor found by the District Court, but was injected into the case for the first time by the Sixth Circuit Court of Appeals as a ground for affirming the lower court's dismissal of petitioners' RICO claim?

3. When respondents have acquired control of the Michigan thoroughbred horse racing industry by gaining complete control of the only two thoroughbred racetracks in Michigan, does respondents' monopoly control of these "essential facilities" require respondents to deal with thoroughbred owners and trainers such as petitioners, even though respondents and petitioners are not direct competitors, where petitioners business absolutely requires use of and access to the racetracks; or may respondents assert a right pursuant to *United States v. Colgate Company*, 250 U.S. 300, 39 S.

Ct. 465, 63 L. Ed. 992 (1919) to refuse to deal with petitioners for any reason whatsoever, including a deliberate purpose to drive the petitioners from the business of thoroughbred racing and to bankrupt petitioners' horse farm because petitioners filed and won a state court lawsuit against one of the respondents for injury to one of petitioners' racehorses?

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT:

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-titled case on July 10, 1992.

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Eastern District of Michigan, Southern Division, is unreported and is printed in the Appendix hereto, page 17a, *infra*. The decision of the District Court denying petitioners' Motion for Rehearing is unreported and is printed in the Appendix hereto, page 15a, *infra*. The Opinion of the Court of Appeals for the Sixth Circuit is reported, *Guzowski v. Hartman*, 969 F.2d 211 (6th Cir. 1992), and is printed in the Appendix hereto, page 2a, *infra*. The Order of the Court of Appeals for the Sixth Circuit denying petitioners' Motion for Rehearing is unreported and is printed in the Appendix hereto, page 1a, *infra*.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on July 10, 1992, and the petitioners filed a timely Petition for Rehearing. That petition was denied by the United States Court of Appeals for the Sixth Circuit on August 12, 1992. Jurisdiction was invoked in the District Court under 28 U.S.C. § 1331; in the Sixth Circuit Court of Appeals under 28 U.S.C. § 1291; and in the United States Supreme Court under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

This appeal involves:

(a) the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2.

(b) the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*

(c) Fed. R. Civ. P. 12(b)(6), 12(c), 15(a), 56(c).

STATEMENT OF THE CASE

Frank Guzowski and his children, Lorraine, Raymond, and Donald Guzowski, owned and operated a family business to breed, train and race thoroughbred horses. The individual respondents were the shareholders and controlling persons of the corporate respondents, Detroit Racing Association, Inc., and Hazel Park Racing Association, Inc. The corporate respondents obtained the only two race meet licenses issued by the State of Michigan for thoroughbred horse racing, during all relevant times from 1979 through 1985.[1]

In 1979, one of petitioners' racehorses was injured at one of respondents' tracks. Petitioners filed suit in state court for the damage to the horse. In 1981, that case was resolved in favor of petitioners. From that moment on, respondents would do no further business with petitioners. Respondents instructed the racetrack employees to refuse to service the petitioners or their horses in any way, and induced others in the thoroughbred racing industry to also refuse to deal with petitioners, making it impossible for petitioners to care for, train, and race their horses. As a result, petitioners' family horse business was rendered essentially valueless. Respondents' concerted refusal to deal, and the concerted boycott respondents sponsored against petitioners, was to punish the petitioners for exercise of their fundamental right to seek a remedy against respondents through the courts, to deter others from exercise of those rights by making a public object lesson of petitioners, and to increase respondents' profits and consequently their ability to compete with other potential race meet sponsors.

Petitioners' original suit was filed by predecessor counsel in

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1. Since that time, respondents have divested themselves of one racetrack and at least one additional thoroughbred track has been opened by persons other than respondents. At the times relevant here, respondents had control of the only two thoroughbred tracks in Michigan.

1981. It was dismissed by the United States District Judge on May 11, 1982. On appeal to the United States Court of Appeals for the Sixth Circuit, the dismissal was affirmed, but the Sixth Circuit also concluded:

> We note, however, that dismissal for failure to state a claim is without prejudice, and the Guzowskis are free to file a new complaint.

Petitioners commenced the current action on July 25, 1984. In pleading violations of the Sherman Act, Section 1, petitioners alleged that they had filed a lawsuit against some of these respondents in the state court, alleging damage to a race horse. In retaliation, petitioners alleged, the tracks instituted a "general boycott" of the petitioners, for the purpose of "preventing Plaintiffs from engaging in the business of thoroughbred horse racing in the State of Michigan." (App. at 35a-36a, Complaint, paragraphs 23-26).

Respondents promptly submitted interrogatories to petitioners asking petitioners to set forth facts in support of the Complaint. On April 17, 1985, petitioners answered respondents' interrogatories, setting forth 14 pages of specific names, dates, places, and events underlying the allegation of "general boycott." These answers clearly and in great detail described those persons whom respondents coerced into agreeing not to deal with petitioners, including other owners and trainers of thoroughbred horses, jockeys, exercise persons, and others not employed by respondents but working in the thoroughbred racing industry.

On October 29, 1985, respondents filed "Defendants' Motion to Dismiss and for Partial Summary Judgment." This duality of "motion to dismiss" *and* "for partial summary judgment" characterized every reference to the Sherman Act Section 1 claim in respondents' motion and brief. Respondents' motion asked the

District Court "to dismiss and/or for partial summary judgment as to Section 1 of the Sherman Act." Respondents presented an argument on *res judicata* grounds, and also argued that the claim was precluded by the just-decided case of *Copperweld Corp. v. Independence Tube Corp.*, 461 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (decided June 16, 1984). Respondents concluded that applying the law to the facts here, the Complaint must be dismissed "either because it fails to state a claim on which relief can be granted or by way of summary judgment." It was, therefore, extremely unclear whether the respondents were assailing the Complaint on its face, Fed. R. Civ. P. 12(b)(6), or alleging that there was no genuine issue of fact, Fed. R. Civ. P. 56. However, respondents referred to, cited and quoted from the deposition of respondent Emanuel Sears in support of their argument. Pursuant to Fed. R. Civ. P. 12(c), this automatically converted the respondents' motion to one seeking summary judgment, and required the court to consider all of the allegations then before the court, Fed. R. Civ. P. 56, including petitioners' 14 pages of detailed factually specific answers to interrogatories filed April 17, 1985.

In response to respondents' motion, on December 23, 1985, petitioners promptly set forth the controlling law and facts which made out a meritorious cause of action under *United States v. Parke, Davis and Company*, 362 U.S. 29, 80 S. Ct. 503 (1960), saying in part:

> In addition, with respect to the Plaintiffs herein, Defendants went far beyond a mere unilateral refusal to deal, and actually attempted to influence others in the horse racing business not to deal with the Plaintiffs. This is the behavior which *Parke, Davis* condemned as going well beyond the right of a businessman merely to select those with whom he will deal . . .

On May 20, 1986, the District Court dismissed the Complaint on *res judicata* grounds, without reaching the question of a *Parke, Davis*-type antitrust violation.

The District Court's ruling was appealed to the Sixth Circuit Court of Appeals by petitioners. Petitioners' brief in the 1986 appeal addressed only the *res judicata* questions upon which the District Court premised its dismissal. Respondents' brief, however, invited the Court of Appeals to conclude that the District Court had reached the right result for the wrong reason, and presented argument on the merits of each count in the Complaint. In their Reply Brief, petitioners again resisted respondents' argument regarding the Sherman Act by relying on *United States v. Parke, Davis and Company, supra.*

The Sixth Circuit Court of Appeals reversed the District Court and remanded for further proceedings.

It took the District Court until May 24, 1989 to restore this case to the docket following remand. On January 12, 1990, respondents again moved "to Dismiss the Complaint and for Partial Summary Judgment." Rather than drafting a new motion, respondents "renewed" and relied on their original 1985 Motion (except that portion based on *res judicata*), stating "Defendants resubmit their original Motion to Dismiss and for Partial Summary Judgment on the remainder of the grounds raised in that motion. . . ." Thus, respondents again did not identify whether their motion was brought pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56. However, respondents again referred to facts outside the pleadings, so petitioners responded to the motion as a Rule 56 motion.

When respondents moved to dismiss the Sherman Act claim, they relied entirely upon *Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 767, 104 S. Ct.

2731, 81 L. Ed. 2d 628 (1984). *Copperweld* held that a corporation cannot conspire with its wholly-owned subsidiary. The Sixth Circuit has broadened the *Copperweld* principle to find that two wholly-owned sibling corporations cannot combine into an "agreement or combination for restraint of trade" in violation of Section 1 of the Sherman Act. *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987).

Assuming, *arguendo*, that the *Copperweld* principles apply to the corporate respondents in this case, each of which is wholly owned by respondents Hartman and Tyner, that should *not* have ended the inquiry. Petitioners clearly alleged that there were others involved in this concerted boycott:

> Defendants coerced others in the racing industry (owners, trainers, breeders, jockeys, outriders, exercise persons) into refusals to deal with Plaintiffs. Defendants threatened to terminate all business with anyone who worked for or with the Guzowskis.

(R.76, Plaintiffs' Brief in Answer to Defendants' Motion to Dismiss, page 9).

Regardless of whether or not the respondents themselves were capable of conspiring with each other, the respondents were clearly capable of conspiring with others in the racing industry in a general, concerted boycott of petitioners' operations, as alleged in paragraph 23 of the Complaint (App. at 35a). Such an allegation makes out a classic case of vertical non-price market restraints, roundly condemned and made actionable in *United States v. Parke, Davis and Company*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960).

In *Parke, Davis*, the Supreme Court affirmed the right of a

manufacturer to announce resale prices to its wholesalers, and simply refuse to deal with those who would not accept such resale price structures. However, the Court found that Parke, Davis had gone well beyond such a mere unilateral refusal to deal. The Court found that Parke, Davis had refused to sell to wholesalers, if those wholesalers sold to distributors who did not observe the Parke, Davis price guidelines. Rather than a mere unilateral refusal to deal, the Court found that defendant had used its refusal to deal power as part of a coercive structure in which those who promoted the manufacturer's interests were rewarded, and those who thwarted them were punished. Where the drug manufacturer induced its wholesalers to agree that *none of them* would sell to a distributor who engaged in disapproved conduct, such action violated Section 1 of the Sherman Antitrust Act.

Answering respondents' motion, petitioners again advised the District Court of the facts and law underlying their *Parke, Davis* case, saying in part:

> The *Copperweld* argument truly misses the point. Plaintiffs have alleged that the Defendant Racing Associations, acting through Defendant Sears and through other employees and agents, not only refused to deal with the Plaintiffs, but also induced others in the racing industry not to deal with Plaintiffs. These coercions ranged from veiled suggestions to direct threats that anyone dealing with the Guzowski family would be shut out of racing, just like the Guzowski family was. Such allegations make out a cause of action for an agreement in restraint of trade under *United States v Parke, Davis and Company*, 362 U.S. 29 (1960).

(Plaintiffs' Brief in Reply to Defendants' Renewed Motion for Summary Judgment, pp. 3-4, February 9, 1990).

The District Court failed to recognize the existence of Fed. R. Civ. P. 12(c), or its applicability. The District Court thus erroneously considered respondents' motion to be a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim (App. at 17a Order Granting Defendants' Motion to Dismiss, May 9, 1990). This was the first indication of any kind on the record that the District Court would ignore the available factual evidence and focus solely on the language of the Complaint. In response, petitioners filed a timely Motion for Rehearing in the district court. Petitioners' Motion for Rehearing noted that the District Court had not ruled on the applicability of *Parke, Davis* to the current cause; indeed, the District Court's opinion ignored petitioner's entire line of argument, without distinguishing it, holding it inapplicable, or even mentioning it. In addition, petitioners specifically requested that the District Court grant leave to amend the Complaint if the court was treating respondents' motion as one pursuant to Fed. R. Civ. P. 12(b)(6), stating:

> There is no question that the law recognizes *Parke, Davis* conspiracies, or that Plaintiffs pleaded such a conspiracy. However, if the court felt that Plaintiffs had not adequately pleaded a *Parke, Davis* conspiracy, then the court should permit Plaintiffs to amend, as Plaintiffs have clearly indicated that they can, in good faith, plead such a conspiracy in avoidance of a 12(b)(6) motion.

The District Court summarily denied the Motion for Rehearing without mentioning the sought-after amendment in any way.

Petitioners then appealed the District Court's order granting respondents' motion, and the District Court's order denying the motion for rehearing, to the Court of Appeals for the Sixth Circuit. Once again, in petitioners' appellate brief and in their reply brief in the Court of Appeals, petitioners described and argued the *Parke, Davis* conspiracy theory.

The Sixth Circuit Court of Appeals filed its opinion on July 10, 1992. The Court of Appeals said nothing about the fact that respondents had quoted deposition testimony in the District Court, thus triggering Fed. R. Civ. P. 12(c) and making respondents' motion a Fed. R. Civ. P. 56 motion. The Court of Appeals did not apparently realize that it was therefore error for the District Court to decide the motion pursuant to Fed. R. Civ. P. 12(b)(6), thus ignoring all of petitioners' proffered facts and considering only the face of the 1984 Complaint. The Court of Appeals adopted without analysis the District Court's determination that respondents' motion, which respondents themselves characterized as one "to dismiss *or for summary judgment*," was a 12(b)(6) motion. Upon that premise, the Court of Appeals discarded eight years of briefs, discovery disclosures, and factual proofs and returned to the original 1984 Complaint. The court scrutinized that Complaint and determined that the allegation of a "general boycott" was not adequate to inform respondents of petitioners' claim that respondents had conspired with others to refuse to deal with petitioners in a *Parke, Davis*-type antitrust conspiracy (App. at 7a, Sixth Circuit Court of Appeals Opinion, fn. 2).

The Court of Appeals made no mention of the fact that petitioners had promptly and specifically asked the District Court for leave to amend. On Motion for Rehearing before the Sixth Circuit Court of Appeals, petitioners prayed for reversal and remand with leave to amend so as to insert into the Complaint the facts previously disclosed in discovery. On August 12, 1992, the Court of Appeals denied the motion without explanation (App. at

1a, Sixth Circuit Order Denying Motion for Rehearing).

Petitioners' 1984 Complaint (App. at 30a) also alleged a violation of the RICO Act, 18 U.S.C. §§ 1961 *et seq.*

Respondents sought dismissal of the RICO claim in the District Court. However, respondents' original Motion to Dismiss or for Partial Summary Judgment in 1985 never argued or alleged that petitioners' Complaint failed to identify the RICO "enterprise" as described in 18 U.S.C. § 1961(4). Respondents, indeed, claimed to understand petitioners' use of "enterprise," stating, "Under this kind of claim, the 'enterprise' itself, *namely each corporation*, is not a proper RICO Defendant." Respondents' renewed motion in 1989 likewise made no claim that petitioners' Complaint failed to plead or identify the RICO "enterprise."

In its Opinion (App. at 17a), the district court never found that petitioners' Complaint failed to properly allege an "enterprise." The district court's entire and complete discussion of petitioners' RICO claims reads as follows:

> Because the Plaintiffs cannot allege an antitrust conspiracy based on the refusal to deal, the alleged activity cannot satisfy the predicate acts requirement under RICO.

(App. at 29a, Defendants' Motion to Dismiss).

On appeal to the Sixth Circuit Court of Appeals, respondents again argued that the respondent corporations "cannot be both Defendants and the 'enterprise' within the meaning of the statute." At no time on appeal did respondents argue that the Complaint was inadequate for failure to identify the "enterprise."

In the Sixth Circuit Court of Appeals' Opinion of July 10,

1992, the Court of Appeals raised the sufficiency of the Complaint *sua sponte*, finding for the first time that:

> The Guzowskis did not specify with particularity the RICO section upon which they relied to support their causes of action. Since they alleged that the corporate Defendants engaged in racketeering activity, the RICO count was presumably initiated pursuant to Section 1962(b), which provides, "it shall be unlawful for any person through a pattern of racketeering activity ... to acquire or maintain, directly or indirectly any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. Section 1962(b) (1984). However, the Guzowskis have not alleged the existence of any enterprise, much less the identity of an enterprise cognizable under RICO, identified as "any individual, partnership, corporation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4) (1984). Since the identity of the enterprise cannot be necessarily or even reasonably inferred from the allegations, and since the identity of the enterprise is left to speculation, the RICO count has failed to state a claim.

(App. at 9a, Sixth Circuit Court of Appeals Opinion).

This argument had never been raised in or decided by the District Court. The Court of Appeals' opinion was the first notice that petitioners had of such an allegation. In petitioners' Motion for Rehearing before the Sixth Circuit Court of Appeals, petitioners

again asked for remand with leave to amend to cure the defect first identified by the Court of Appeals *sua sponte*. That motion was denied without explanation.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS WERE MASSIVELY PREJUDICED BY THE FAILURE TO TIMELY IDENTIFY RESPONDENTS' MOTION AS ONE ATTACKING THE PLEADINGS, AND BY THE UNWARRANTED REFUSAL TO ALLOW A FIRST AMENDED COMPLAINT WHEN PETITIONERS COULD CLEARLY HAVE PLEADED FACTS TO CURE ANY DEFECT IN THEIR COMPLAINT.

Manifest injustice has been worked by the decisions of the United States District Court and of the Court of Appeals for the Sixth Circuit. The rulings of those courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Otherwise, a family business will have been utterly destroyed and the destroyers allowed to go free, not because the law justifies their escape but because the rules of procedure have been applied unfairly to deprive petitioners of any hearing on the merits of their claims.

Fed. R. Civ. P. 15(a) provides for the amendment of complaints by leave of court, "and leave shall be freely given when justice so requires." As an example of when justice requires amendment, the Sixth Circuit itself has previously said that where counsel thought the complaint was sufficient, but the District Court ruled it insufficient, plaintiff should be allowed a chance to amend to clearly plead the disputed theory, *Mannino v. International Manufacturing Company,* 650 F.2d 846 (6th Cir. 1981).

A strong policy favors liberality of amendment. *Borden, Inc. v. Florida East Coast Railway Company*, 772 F.2d 750 (11th Cir. 1985). The purpose of allowing amendment is to prevent "technicalities" in pleading from impeding the just resolution of a case on its merits, *Mineral Industries and Heavy Construction Group v. Occupational Safety and Health Review Commission*, 639 F.2d 1289 (5th Cir. 1981). Amendment reinforces the purpose of pleadings in general, which is to assist in the disposition of litigation on the merits of the case, rather than having the pleadings become ends in themselves. *Summit Office Park Inc. v. U.S. Steel Corp.*, 639 F.2d 1278 (5th Cir. 1981). The rule is intended to further a basic policy of the federal rules, that pleadings are not ends in themselves but are only a means to assist in the presentation of a case, to enable it to be decided on the merits. *Stone Mountain Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (D.C. Ga. 1983). Rulings on amendment requests must be guided by the underlying purpose of the amendment rule, which is to facilitate decision on the merits rather than on the pleadings or technicalities, *United States v. Webb*, 655 F.2d 977 (9th Cir. 1981).

Amendment should be liberally granted where, from the underlying facts and circumstances, it appears petitioner may be able to state a claim, *McCartin v. Norton*, 674 F.2d 1317 (9th Cir. 1982). Claims should be determined on their merits, and amendment helps prevent litigation from becoming a technical exercise in the fine points of pleadings. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594 (5th Cir. 1981). Indeed, where a defect in pleading can be cured and the defendant will not be prejudiced, leave to amend at least once should normally be given as a matter of course. *Oliver Schools Inc. v. Foley*, 930 F.2d 248 (2nd Cir. 1991). Pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, but amendment should be allowed to achieve justice. *Young v. Collins*, 574 F.2d 1147 (4th Cir. 1978).

Amendment is generally a question addressed to the good faith discretion of the court, *Miller v. Metropolitan Life Insurance Company*, 925 F.2d 979 (6th Cir. 1991); *Robinson v. Michigan Consolidated Gas Company Inc.*, 918 F.2d 579 (6th Cir. 1990). That discretion, however, is not unfettered, and where amendment has been refused, and the District Court has failed to state justification for the refusal, this will generally be deemed an abuse of discretion. *Gootee v. Colt Industries, Inc.*, 712 F.2d 1057 (6th Cir. 1983).

Here, the original 1985 motion by respondents did not attack the face of the pleadings, but rather cited evidence outside the pleadings in support of respondents' positions. Pursuant to Fed. R. Civ. P. 12(c), this converted the motion to a Rule 56 summary judgment motion, and required the District Court to consider matters outside the pleadings, including petitioners' 14 pages of factually-specific interrogatory answers which clearly and at great length delineated the facts in support of petitioners' antitrust claim under *United States v. Parke, Davis and Co.*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960). The District Court failed to consider this material, treating the motion as one under Fed. R. Civ. 12(b)(6) (App. at 17a, Opinion). Immediately upon this identification of the motion as one attacking the pleadings, petitioner asked the District Court for leave to amend. The District Court denied that motion without discussion. (App. at 15a, Order Denying Rehearing). By failing to address the amendment request, or give any reason why amendment was not appropriate, the District Court erred. It was the power and duty of the court to consider on the merits a proposed amendment to a defective allegation, once the court's attention was called to the defect and amendment was sought. *Kiser v. General Electric Corp.*, 831 F.2d 423 (3rd Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 238.

Petitioners acknowledge that their request was made in 1990 to amend a 1984 Complaint. Delay in requesting amendment of

pleadings is not, standing alone, a permissible reason to deny leave to amend. *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987); *Tefft v. Seward*, 689 F.2d 637 (6th Cir. 1982). However, delay and prejudice to defendant may be considered, *Duchon v. Cajon Company*, 791 F.2d 43 (6th Cir. 1986); *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980). Unless delay is due to dilatory tactics, the District Court should deny amendment due to undue delay only where amendment prejudices the opponent. *United States v. Currency $267,961.07*, 916 F.2d 1104 (6th Cir. 1990).

Petitioners' delay in requesting amendment here is not due to dilatory tactics. Petitioners, indeed, have gained nothing by delay, and have done nothing which would suggest that delay was deliberate. The time periods are accounted for as follows:

(a) Time from complaint (App. at 30a, July 25, 1984) through completion of petitioners' Brief in Opposition to respondents' original motion (December 23, 1985): time spent in discovery and in complying with court briefing schedule on respondents' motion. Respondents' motion did not clearly attack the pleadings and referred to matters outside the record, therefore was properly understood as a Rule 56 motion rather than a motion for judgment on the pleadings.

(b) Time from the completion of briefing on respondents' motion (December 23, 1985), through the grant of that motion (May 20, 1986): time taken by the District Court to consider and rule upon the motion. The court dismissed the case on *res judicata* grounds, therefore never reached any other question in the case.

(c) Time from Order granting respondents' motion (May 20, 1986) through reversal of the District Court by the Sixth Circuit Court of Appeals (June 29, 1988): time required

for the Court of Appeals to consider and reverse the trial judge's *res judicata* ruling, which ruling did not involve any attack on the adequacy of the pleadings themselves.

(d) Time from reversal by the Sixth Circuit Court of Appeals (June 19, 1988) through restoration of case to District Court docket (May 24, 1989): time taken procedurally by District Court to restore case to docket, no jurisdiction in court prior to that time.

(e) Time from restoration to docket (May 24, 1989) through respondents' renewed motion for judgment (January 12, 1990): administrative time taken by the District Court to rule on petitioners' Motion for Status Conference (filed May 8, 1989) and to schedule and hold status conference on December 5, 1989 .

(f) Time from respondents' renewed motion (January 1, 1990) through the Order granting respondents' motion (App. at 17a, Opinion, May 9, 1990): time taken by District Court to decide respondents' motion. The motion still did not clearly attack the pleadings, and did refer to matters outside the pleadings in requesting judgment. The motion was again properly understood therefore as a Rule 56 motion, *see* Fed. R. Civ. P. 12(c).

(g) When the District Court granted respondents' motion (App. at 17a, Opinion May 9, 1990) construing respondents' motion for the first time as a Rule 12(b)(6) motion, petitioners immediately moved (May 22, 1990) for rehearing including a specific request for leave to amend the complaint to cure any defects.

None of the delays in this case has been due to dilatory tactics by petitioner. Thus, the key question is whether respondent would

be prejudiced by allowing amendment.

The Sixth Circuit has considered the following items to be instances where respondents might claim "prejudice" from amendment: (a) where the defendant has insufficient time for discovery on the amended complaint; (b) where defendant is unfairly surprised due to a change in plaintiff's theory; or (c) where there is insufficient time for the defendant to conform the defendant's pleadings to the plaintiff's added claim. *United States v. Wood*, 877 F.2d 453 (6th Cir. 1989).

None of these applies here. This case has never been to final pretrial conference, and has never been set for trial. Respondents have had ample time for discovery, and actually took discovery and discovered great quantities of detailed information concerning petitioners' *Parke, Davis* claim. Respondents are not surprised, as this claim has been described in numerous briefs starting in 1985. There is ample time for the respondents to file an amended answer in the District Court, should amendment be permitted. Respondents cannot seriously claim prejudice. On the other hand, petitioners have been victimized by respondents who declared that they would destroy petitioners' business, set out deliberately to do it, and succeeded. Petitioners' meritorious claims concerning those facts were utterly lost to petitioners when amendment was denied.

This is not a case where amendment would have disrupted the trial schedule, *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984); or where petitioners had never before pursued the theory embodied in the amendment, *Diaz v. San Jose Unified School District*, 705 F.2d 1129 (9th Cir. 1983); or where the failure to raise the issue earlier in the case was deliberate or intentional, *Communications Systems Inc. v. City of Danville Kentucky*, 880 F.2d 887 (6th Cir. 1989); or where the claim was unsupported by facts, *Ma v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), *cert.*

denied, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273; or where amendment would have defeated the court's jurisdiction, *Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988). This case is far more like *Moore v. City of Paducah*, 790 F.2d 557 (6th Cir. 1986). There, the Sixth Circuit Court of Appeals found that unjustified delay alone was not the basis to properly deny amendment, where the prejudice to defendant was relatively light, the rejection of the amendment would preclude plaintiff's opportunity for a hearing on the merits, the facts were well known to the parties, and the pleadings attempted to set forth the proper claim for relief although erroneously seeking relief under the wrong section of the Civil Rights Act.

In ordinary course, where a defect is identified in a plaintiff's complaint, a plaintiff who promptly requests leave to amend is granted amendment at least once to cure the defect. That ordinary course of judicial proceedings was not followed in this case, and neither the District Court nor the Sixth Circuit Court of Appeals has explained in any way why leave to amend was denied. The net result of the denial is that petitioners, who have lost their family business as a result of respondents' actions, are left without a remedy. This result obtains not because they have failed to identify facts in support of their theory, but because those facts were placed into answers to interrogatories, rather than being placed into the Complaint. This is precisely the sort of hypertechnical pleading construction which the federal rules were intended to avoid. It is plain, unfortunately, that only through Supreme Court intervention can justice be done in this case.

II.

IT WAS MANIFESTLY UNJUST FOR THE SIXTH CIRCUIT COURT OF APPEALS TO SEARCH OUT A NEW, PREVIOUSLY UNRAISED DEFECT IN PETITIONERS' PLEADING, TO SUPPORT THE DISMISSAL ORDER OF THE DISTRICT COURT, WHILE SIMULTANEOUSLY DENYING PETITIONERS ANY OPPORTUNITY TO AMEND TO CURE THE DEFECT.

All that has been said with respect to petitioners' Sherman Act antitrust claims applies with redoubled force to petitioners' RICO claims. Neither respondents nor the District Court ever assailed the pleadings or claimed that they were defective for failure to identify a RICO "enterprise." The insufficiency of those allegations was raised *sua sponte* by the Sixth Circuit Court of Appeals, which announced that petitioners' RICO claims must be dismissed for inadequate pleading, and then denied petitioners any opportunity to amend to cure the defect first raised by the Court of Appeals. Where the appellate court has become an active advocate for the opposing party, the supervisory powers of the Supreme Court are the only protection afforded a litigant.

III.

A MONOPOLIST CONTROLLING AN "ESSENTIAL FACILITY" MUST HAVE A LEGAL DUTY TO DEAL WITH THOSE TO WHOM THE FACILITY IS ESSENTIAL, WITHOUT REGARD TO WHETHER OR NOT SUCH PERSONS ARE DIRECT HORIZONTAL COMPETITORS OF THE MONOPOLIST.

A monopolist in control of an "essential facility" should have a duty imposed under federal antitrust law to deal with those to

whose business the facility is essential. This is an important question of federal antitrust law which has not been, but should be, settled by the Supreme Court.

A manufacturer generally has a right to deal or to refuse to deal with whomever it chooses, so long as it does so independently. *United States v. Colgate and Company*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed 992 (1919).

Under the so-called "Colgate Doctrine" one may generally deal or refuse to deal, as one sees fit. However, there are some circumstances where a monopoly is naturally created, or is created by state regulation. In such circumstances, antitrust law has imposed limitations upon the power of a monopolist to refuse to deal.

The *Colgate* Court itself qualified its endorsement of refusals to deal, holding that one may refuse to deal with another "in the absence of any purpose to create or maintain a monopoly." It is clear that a trader's prerogative to select his customers will not protect any misuse of monopoly power in which a monopolist unilaterally refuses to deal "to foreclose competition or gain a competitive advantage or destroy a competitor," *United States v. Otter Tail Power Company*, 410 U.S. 366, 377 (1973).

The duty of one enjoying a natural monopoly to deal with others in the same industry is one of the most "unsettled and vexatious" issues in antitrust law. *Aspen Highlands Skiing Corp. v. Aspen Skiing Company*, 738 F.2d 1509, 1519 (10th Cir. 1984).

The Sixth Circuit Court of Appeals reviewed "monopolist refusal to deal" cases in *Byars v. Bluff City News Company*, 609 F.2d 843 (6th Cir. 1979). There, the court found that the action of a monopolist was improper, because it was undertaken expressly to achieve an anti-competitive effect. The court in *Byars* reviewed

and categorized various monopolists from existing cases, and examined their various unilateral refusals to deal. The court was limited to the factual circumstances presented in such cases. None of those cases was on all fours with the present case. Here, the racetracks do not compete with horse owners, but they are nonetheless wrapped in an economic symbiosis of substantial proportions. Without horse owners, there would be no horses, hence no horse races, hence no spectators and no betting. Control of horses is crucial to the racetracks' economic power. On the other hand, without the racetracks, horse owners have no physical location to stage their races.

The State of Michigan limits the number of racetracks which may obtain track licenses, without which it is illegal to operate a racetrack. MCLA 431.68(5)(6). Hence, by the scheme of state regulation, the person who controls a racetrack is in a natural situation of monopoly. Such a person has, in fact, obtained control of an "essential facility."

In their Complaint, petitioners alleged that the respondents had obtained control of the only two thoroughbred racetracks then existing in the State of Michigan. Respondents thus had obtained control of the essential facilities for thoroughbred racing in the entire state. Without dealing with respondents, no person in the State of Michigan could engage in thoroughbred racing (App. at 31a-32a, Complaint, paragraphs 7-13).

Under these circumstances, there is no plain reason to restrict the "essential facilities" doctrine to actions involving direct horizontal competitors, as did the District Court and the Sixth Circuit Court of Appeals. While the Sixth Circuit in *Byars* spoke to the issue in terms of competitors ("under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it," *Byars*, 609 F.2d at 858), *Byars* was merely surveying the existing case law, all

of which deals with horizontal competitors restricted from use of essential facilities by those who have obtained control. *Byars* should not have been read as limiting the exclusive facility doctrine only to such fact situations.

In fact, the underlying antitrust rationale for the "essential facilities doctrine" is decidedly in jeopardy here. Given respondents' control of the entire thoroughbred racing industry in Michigan, no person could engage in the business of thoroughbred racing unless he or she dealt with respondents. The ability to exclude one or more horse owners from the essential racetrack facility was, therefore, the ability to control competition by and between the horse owners and trainers, in its entirety. By controlling such competition, respondents could obtain tremendous bargaining power in their negotiations with the horse owners' representative, the Horsemen's Benevolent Protective Association. The threat of refusal to deal, and its actualization, not only impacted competition among the horsemen, but was a direct economic advantage to the track as well. The anti-competitive effects of respondents' practice are felt at every horizontal level of competition in the thoroughbred racing industry, and the anticompetitive results are at least as pernicious as those condemned by the "essential facilities" doctrine when applied between direct, horizontal competitors.

Respondents clearly abused their monopoly power in this case. Respondents refused to deal with the petitioners as a punishment of petitioners for suing respondents in the Michigan courts. Petitioners were to be an object lesson to the thousands of other horse owners and trainers, showing them what would happen to them if they dared seek redress for the negligence of the track, even where such claims were well justified (as the jury found petitioners' claims were). Access to the court system is a fundamental constitutional right, *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). A monopolist should

not be legally permitted to refuse to deal for the purpose of coercing an entire industry into giving up such fundamental constitutional rights. From an economic and antitrust standpoint, such a monopolist should not be allowed to harm competition by driving from the marketplace all those who refuse to surrender their rights and thus fall under the economic hammer called "refusal to deal."

In its Opinion (App. at 28a, Order Granting Defendants' Motion to Dismiss), the District Court took the narrow and simplistic approach that a monopolist in control of a scarce facility only has a duty to deal with direct, horizontal competitors. Since "Plaintiffs do not allege that the Defendants are competitors," the District Court dismissed this claim. The Court of Appeals affirmed:

> As the District Court correctly reasoned, the Sherman Act Section 2 claim failed as a matter of law. The Guzowskis had not alleged, nor can it be reasonably inferred from the facts, that they had been in competition with the racetracks since the Guzowskis were not rivals nor potential rivals to the enterprise of owning and operating a racetrack, the racetracks here in controversy could not have abused their monopoly power from entering or operating a racetrack in restraint of trade. *United States v Grinnel Corp.*, 384 US 563, 570-71, 86 S Ct 1698, 1704 (1966); *Byars v Bluff City News Company, Inc.*, 609 F2d 843, 853 (6th Cir., 1979).
>
> Moreover, since the Defendant racetracks had not engaged in the enterprise of breeding, training, and racing their own horses, the

> failure of the tracks to afford the Guzowskis equal access to the tracks through the allocation of stall space did not constitute a Sherman Act Section 2 claim. *Byars*, 609 F2d at 856-58. Even if the racetracks unfairly excluded the Guzowskis from such "essential facilities" such exclusion would not have maintained or enhanced the racetracks' market position, which is a legal prerequisite to a Section 2 claim.

The Sixth Circuit Court of Appeals had no basis in the record for any factual finding that exclusion of the Guzowskis from the racetracks would not have "maintained or enhanced the racetracks' market position." Such an assertion was patently false, and had petitioners had any inkling that it was to be proposed, they would have presented evidence to rebut it. More importantly, however, the Sixth Circuit Court of Appeals has by this opinion sanctioned the deliberate bankrupting of small businesses, by one who operates a facility essential to such businesses, merely because there is no direct, horizontal competition between the excluder and the party excluded. Such a holding announces an antitrust policy inimical to competition and without justification. By grant of Writ of Certiorari, the Supreme Court may consider whether to curtail such monopolist abuses.

CONCLUSION

Respondents injured one of petitioners' race horses, and petitioners filed suit in state court and recovered damages. From the date of that verdict, respondents refused to do any business with petitioners, even though petitioners' horse farm was essentially valueless and bankrupt unless the horses could be raced at respondents' thoroughbred racetracks. Respondents decided to destroy the petitioners' business in retaliation for the lawsuit, and

they successfully did so.

Petitioners filed suit under the Sherman Antitrust Act for this concerted refusal to deal, and for abuse of monopoly power by respondents while in control of "essential facilities." Petitioners also alleged RICO violations by which respondents further influenced and controlled horse owners and breeders in Michigan.

Respondents moved for "dismissal and/or summary judgment," but their motion and brief made reference to matters outside the pleadings, automatically converting the motion to a summary judgment motion pursuant to Rule 56(c). After petitioners responded appropriately under Rule 56, however, the District Court chose to treat the motion as one under Rule 12(b)(6). The District Court therefore ignored all of petitioners' specific factual disclosures during discovery, which clearly showed a justiciable claim, and instead scrutinized the complaint and decided that the phrase "general boycott" was not specific enough to inform respondents of petitioners' claim that respondents had conspired with non-defendants to harm petitioners' business. Petitioners' prompt motion for leave to amend was denied without comment. The Sixth Circuit Court of Appeals affirmed, without analysis, the District Court's decision to consider respondents' motion under Rule 12(b)(6) rather than under Rule 56. The Sixth Circuit thus affirmed the District Court's dismissal. In addition, the Sixth Circuit decided *sua sponte* that petitioners had failed to identify any RICO "enterprise," and although the District Court had dismissed the RICO count erroneously, the Sixth Circuit affirmed the dismissal, again under Rule 12(b)(6), for inadequate pleading. Again, petitioners' prompt Motion for Rehearing seeking leave to amend in the Sixth Circuit was denied without comment.

Petitioners now apply for a Writ of Certiorari. To ignore all of the factual disclosures during discovery, to ignore all of the

explicatory documents petitioners have filed throughout the course of this case to explain and provide foundation for their claims, and to turn the clock back eight years to the naked face of the Complaint, and dismiss based on the Complaint alone, without any leave to amend whatsoever, is not consistent with substantial justice. It is a departure from general judicial proceedings which works a grave injustice to petitioners and which amply merits Supreme Court intervention.

Moreover, the Sixth Circuit Court of Appeals has announced an antitrust policy which permits a monopolist in control of an "essential facility" to bankrupt any small businessman reliant upon that facility. The Court of Appeals has not limited that policy to permissible business purposes, but has clearly announced that it is available to every monopolist who wishes to receive any concession from his customers, even up to and including the coercive surrender of constitutional rights. Respondents, angry with petitioners for defeating them in a meritorious lawsuit, simply decided to put the petitioners out of business as an object lesson. Respondents therefore excluded petitioners from all thoroughbred racetracks in the State of Michigan, which respondents controlled. It is poor antitrust policy which encourages the very conduct the Sherman Act was intended to curb. This is an important issue which should be settled by the Supreme Court.

Petitioners therefore respectfully pray for certiorari, or in the alternative, for summary reversal and remand to allow petitioners to file a First Amended Complaint in the United States District Court.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 12, 1992

Case No: 90-1737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FRANK GUZOWSKI; LORRAINE GUZOWSKI; DONALD GUZOWSKI; RAYMOND GUZOWSKI;

Plaintiffs-Appellants

THERESA GUZOWSKI

Plaintiff

v.

BERNARD HARTMAN

Defendant-Appellee

BEFORE: KEITH and MARTIN, Circuit Judges; KRUPANSKY, Senior Circuit Judge

Upon consideration of the petition for rehearing filed by the defendant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 10, 1992

No. 90-1737

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK GUZOWSKI; LORRAINE GUZOWSKI; RAYMOND GUZOWSKI; and DONALD GUZOWSKI,
Plaintiffs-Appellants,

v.

BERNARD HARTMAN; HERBERT TYNER; EMANUEL J. SEARS; JAMES KAROUB; DETROIT RACING ASSOCIATION, INC.; and HAZEL PARK RACING ASSOCIATION, INC.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed July 10, 1992

Before: KEITH and MARTIN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

KRUPANKSY, Senior Circuit Judge. The plaintiffs-appellants Frank Guzowski, Lorraine Guzowski, Raymond Guzowski, and Donald Guzowski ("Guzowskis") have appealed the order and judgment of

the district court dismissing their complaint for failure to state a claim. The Guzowskis, who owned and operated a family partnership that engaged in breeding, training, and racing thoroughbred horses, brought this complaint against the Hazel Park Racing Association, Inc., which owns and operates the Hazel Park Race Course, Detroit Racing Association, Inc., and its subsidiary the Detroit Race Course. Both racing corporations are owned by the defendants-appellees Bernard Hartman and Herbert Tyner. The defendant-appellee Emanuel J. Sears was racing secretary at both tracks.[1]

This is the third appellate review of this controversy. The Guzowskis filed the initial complaint in this action in 1981. It charged violations of the Sherman Act, 15 U.S.C. sections 1 and 2, 42 U.S.C. section 1983, and 42 U.S.C. section 1985(3). It also asserted several pendent state law causes of action. The first complaint was dismissed by the district court (Churchill, J.) for failure to state a claim. This court affirmed the district court's dismissal of the only count appealed, the Sherman Act section 1 refusal to deal claim. *Guzowski v. Hartman*, No. 82-1819 (6th Cir. Nov. 28, 1983) (per curiam).

The Guzowskis filed a second complaint in 1984, which is currently under review. The allegations in the second complaint, like the allegations of the first complaint, are anchored in the same conspiracy that the Guzowskis assert was calculated to bar them from racing thoroughbred horses in Michigan by refusing to permit their horses onto the Michigan tracks, denying their horses stall space, and publishing false statements about Frank Guzowski. The second complaint was essentially the same as the first complaint and alleged violations of the Sherman Act, 15 U.S.C. sections 1 and 2, and the Clayton Act, 15 U.S.C. sections 14 and 25, in Counts II and III. Counts IV and V alleged violations of 42 U.S.C. sections 1983 and 1985(3). Count X alleged a violation of the Racketeer

[1] Although James Karoub is a named defendant, the complaint does not allege his specific role nor his wrongful acts.

Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961 to 1968, together with four counts of pendent state law violations.

The district court (La Plata, J.) dismissed the entire second complaint by applying the doctrine of res judicata. A panel of this court reversed that dismissal, concluding that this court's affirmance of the trial court's dismissal of the first complaint was without prejudice, thereby permitting the Guzowskis to refile the Sherman Act section 1 action. This court also explained that the RICO recovery, if any existed, was embraced within the same general refusal to deal theory arising under the Sherman Act section 1 cause of action and, accordingly, remained as a viable action. Finally, this court stated that the 1981 causes of action that were not appealed in the first appeal, the Sherman Act section 2 cause of action and the 42 U.S.C. section 1983 and 1983(5) causes of action, were to be evaluated under principles of issue preclusion, i.e., collateral estoppel, rather than claim preclusion, i.e., res judicata. *Guzowski v. Hartman*, 849 F.2d 252, 255-56 (6th Cir. 1988) (*Guzowski II*).

On remand, the district court addressed the sufficiency of the Sherman Act sections 1 and 2, the Clayton Act, and the RICO causes of action on their individual merits and dismissed them for failure to state a claim. The district court determined that the sections 1983 and 1983(5) causes of action were barred by issue preclusion. The Guzowskis have appealed the dismissal of all the federal causes of actions except those invoking the Clayton Act.

The charged trial court error in the second dismissal of the second complaint is reviewed by this court de novo pursuant to Fed. R. Civ. P. 12(b)(6). *Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 885 (6th Cir. 1990); *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987). In considering the sufficiency of the complaint, this court must construe the complaint in the light most favorable to the Guzowskis, accept all of the Guzowskis' factual allegations as true, and affirm the dismissal only if

"it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *Dana Corp.*, 900 F.2d at 885.

Section 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (Supp. 1991). As the statutory language indicates, the threshold requirement to proving a section 1 refusal to deal cause of action is a contract, agreement, or conspiracy to restrain trade. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982). Section 1 does not reach conduct that is "wholly unilateral" and does not reach agreements between the officers of a corporation and its employees. The thrust of a conspiracy to restrain trade within the factual parameters of this case is concisely explained by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984):

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination . . . or conspiracy' in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. . . . For these reasons, officers or employees of the same firm do not

provide the plurality of actors imperative for a § 1 conspiracy.

There is also a general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. Although this Court has not previously addressed the question, there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

. . . .

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses driving a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do

> "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interest, and there is no justification for a § 1 scrutiny.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. at 769-771, 104 S. Ct. at 2740-42; *see also Directory Sales Mgmt. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987).

In the instant case, the district court noted that although the two racetracks are owned by separate corporations, the shareholders of the corporations, Hartman and Tyner, are identical. The corporations were, accordingly, a single economic unit serving a common interest and could not conspire with each other. *See American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S. Ct. 1125, 1139 (1946). The common economic identity of the two corporations is reinforced by the contained size of the corporations and their limited shareholders. Thus, the racetracks could not, for purposes of a Sherman Act section 1 cause of action, combine, contract or conspire to restrain trade. Likewise, under *Copperweld Corp.*, the officers of the corporations could not combine, contract, or conspire with the corporation's own employees of its related entities. *Copperweld Corp.*, 467 U.S. at 769-70, 104 S. Ct. at 2740-41.[2]

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[2] A review of *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919), and its progeny, including *Frey & Son, Inc. v. Cudahey Packing Co.*, 256 U.S. 208, 41 S. Ct. 451 (1921); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S. Ct. 150 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 64 S. Ct. 805 (1944), and, ultimately, *United States v. Parke, Davis and Co.*, 362 U.S. 29, 80 S. Ct. 503 (1960), reflects that the Supreme Court in *Colgate* directed "that a manufacturer is not guilty of a combination or conspiracy if he merely 'indicates his wishes concerning prices and declines further dealings with all who fail to observe them . . .'; however, there is unlawful combination where a manufacturer 'enters into agreements -- whether express or implied from a course of dealing or other circumstances -- with all customers . . . which undertake to bind them to observe fixed resale prices.'" *Parke, Davis*, 362 U.S. at 39, 80 S. Ct. at 509 (quoting *United States v. Schrader's Son, Inc.*, 252 U.S. 85, 99, 40 S. Ct. 251, 253 (1920)). The court went on to conclude in *Parke, Davis* that

Appendix B

As noted earlier, this court determined in *Guzowski II* that the RICO cause of action was not precluded because the underlying theory arose out of the same cause of action that had been previously appealed to this court from the dismissal of the first 1981 complaint, that is, the refusal to deal section 1 Sherman Act cause of action. *Guzowski II*, 849 F.2d at 255-56. The district court dismissed the 1984 RICO cause of action, reasoning that the RICO predicate act, the two acts of racketeering activity essential to proving a pattern of racketeering activity pursuant to 18 U.S.C. section 1961(5), was the Sherman Act section 1 conspiracy, which the district court had already determined did not state a claim.

However, the Guzowskis' 1984 RICO count had not, as the district court had assumed in dismissing the RICO count, alleged the antitrust conspiracy as the predicate act. Rather, the Guzowskis had enumerated twenty-two alleged acts of the corporate defendants, acting through their servants, agents, and employees, that essentially "fixed" horse races. These allegations, if true, would have satisfied the predicate acts requirement of RICO, since many of those acts, such as influencing jockeys to "throw" races, would be punishable under state law by

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"if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. . . . The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act." *Parke, Davis*, 362 U.S. at 47, 80 S. Ct. at 513.

According the plaintiff's complaint the most generous interpretation, it simply fails to plead, beyond broad conclusory generalities, a cause of action as defined in *Parke, Davis*. It discloses no factual basis or circumstances that would invoke the precedent enunciated in *Colgate* and its progeny, including *Parke, Davis*.

The factual allegations of the complaint disclose no combination or conspiracy between owners, trainers, breeders, jockeys, and the owners of the racetracks, their employees, agents, or representatives that would constitute a section 1 Sherman Act violation. In sum, the pronouncements of *Colgate* and *Park, Davis* are inapplicable to a

imprisonment for more than one year, Michigan Compiled Laws Annotated § 431.85 (West Supp. 1991), and would also have violated federal law, 18 U.S.C. §§ 1084 & 1955 (1984), thus satisfying the definition of racketeering activity under 18 U.S.C. section 1961(1).[3]

The Guzowskis did not specify with particularity the RICO section upon which they relied to support their causes of action. Since they alleged that the corporate defendants engaged in racketeering activity, the RICO count was presumably initiated pursuant to section 1962(b), which provides, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b) (1984). However, the Guzowskis have not alleged the existence of any enterprise, much less the identity of an enterprise cognizable under RICO, identified as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1984). Since the identity of the enterprise cannot be necessarily or even reasonably inferred from the allegations, and since the identity of the enterprise is left to speculation, the RICO count has failed to state a claim.

The RICO cause of action also fails to state a claim if construed pursuant to 18 U.S.C. section 1962(c). Section 1962(c) states that "[i]t shall be unlawful for any person

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resolution of the instant appeal, and the plaintiffs' reliance upon those cases as precedent is misconceived.

[3]Section 1961(1) defines racketeering activity to include any act or threat involving, inter alia, gambling, "which is chargeable under State law and punishable by imprisonment for over a year." 18 U.S.C. § 1961(1)(A) (Supp. 1991). It also includes any act indictable under, inter alia, 18 U.S.C. section 1084, which relates to the transmission of gambling information, and 18 U.S.C. section 1955, which prohibits illegal gambling businesses. 18 U.S.C. § 1961(1)(B) (Supp. 1991).

employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (1984). Because the statutory language requires that the RICO "person" be "employed by or associated with any enterprise," the RICO "person" generally must be distinct from the "enterprise." *See, e.g., Landry v. Air Line Pilots Ass'n International AFL-CIO*, 901 F.2d 404, 425 (5th Cir. 1990); *Schreiber Distributing*, 806 F.2d at 1396; *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 800 (1986). Again, the Guzowskis have failed to properly plead and/or identify any enterprise, much less specify the existence of an "enterprise" separate and distinct from the corporate RICO "persons." Finally, because the RICO count lacks any allegation that would conjoin the named noncorporate defendants with the purported acts, this court cannot infer that the individual defendants are either the RICO "persons" or "enterprise." *United States v. Yonan*, 800 F.2d 164, 168 (7th Cir.), *cert. denied*, 107 S. Ct. 930 (1986) (complaint must allege some relationship between defendant and business of enterprise to satisfy association/employment requirement of section 1962(c)).

Finally, the Guzowskis' Sherman Act section 2 monopoly, section 1983, and 1983(5) causes of action that had been joined in the 1981 complaint were dismissed by the district court for failure to state a claim and were not appealed. The district court's decision on remand to address the merits of the Sherman Act section 2 cause of action is understandable and the district court's reasoning on the merits is unassailable.[4] However, the Sherman Act section 2 cause of action is more appropriately

[4]As the district court correctly reasoned, the Sherman Act section 2 claim failed as a matter of law. The Guzowskis had not alleged, nor can it be reasonably inferred from the facts, that they had been in competition with the racetracks. Since the Guzowskis were not rivals nor potential rivals to the enterprise of owning and operating a racetrack, the racetracks here in controversy could not have abused

evaluated under the doctrine of issue preclusion. As this court noted in *Guzowski II*, while a dismissal for failure to state a claim is a judgment on the merits, such a dismissal only determines the legal sufficiency of the complaint in respect to the facts alleged. *Guzowski II*, 849 F.2d at 256. Thus, the Guzowskis were not precluded from realleging and relitigating the facts in order to support the legal sufficiency of the causes of action joined in the second complaint, which had been filed in 1984. However, under issue preclusion, the Guzowskis were barred from relitigating the same theories of recovery, that is, the identical issues, that had been joined in the first complaint and/or that could have been joined in the 1981 complaint which was dismissed by the district court and never appealed. *Guzowski II*, 849 F.2d at 256.

In the 1981 complaint, the Guzowskis alleged that the defendants monopolized or attempted to monopolize the racetrack industry in Michigan. Judge Churchill dismissed the count after deciding that the state's pervasive regulation of the racetracks imbued the individual defendants with antitrust immunity under the state action doctrine. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 943 (1980); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S. Ct. 1123, 1135 (1978). After dismissing this count, Judge Churchill accorded the Guzowskis the opportunity to amend their complaint to plead an antitrust cause of action that had as its predicate the allocation of stall

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their monopoly power from entering or operating a racetrack in restraint of trade. *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 (6th Cir. 1979).

Moreover, since the defendant racetracks had not engaged in the enterprise of breeding, training, and racing their own horses, the failure of the tracks to afford the Guzowskis equal access to the tracks through the allocation of stall space did not constitute a Sherman Act section 2 claim. *Byars*, 609 F.2d at 856-58. Even if the racetracks unfairly excluded the Guzowskis from such "essential facilities," such exclusion would not have maintained or enhanced the racetracks' market position, which is a legal prerequisite to a section 2 claim.

space, an activity that was not clearly exempt from antitrust liability. Aside from recharacterizing the antitrust counts, the Guzowskis filed an amended complaint that joined identical antitrust issues, which had been previously dismissed for failure to state a claim.

In the instant complaint, the section 2 monopoly cause of action is again premised on the defendants' misuse of a state-granted monopoly, that is, that the defendants had combined to use their monopoly power over stall space to control horses that would be permitted to race at the Michigan tracks. The Guzowskis have pursued this same theory of recovery supported by the same operative facts on at least three occasions. Since the Guzowskis had not appealed Judge Churchill's decision disposing of the section 2 monopoly issue, they are now barred from relitigating it.

Similarly, the facts alleged in the 1984 complaint to support the section 1983 and section 1983(5) causes of action do not differ from the facts alleged and dismissed in the 1981 complaint. In the 1981 complaint, the Guzowskis had asserted that the state extensively regulated the horse racing industry and, by acting through the racing commissioner, controlled all pari-mutual wagering on horse racing in Michigan. In the 1984 complaint, the Guzowskis again have alleged that the state has regulated the horse racing industry and that the racing commissioner, whose position was created by state law, was charged with the duty, under state law, of insuring that the regulations and rules of Michigan racing law were followed.[5]

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[5]A comparative review of the 1981 and 1984 complaints discloses that the 42 U.S.C. section 1983 cause of action alleged in the 1981 complaint was not anchored in the refusal of the defendants to assign stall space to the plaintiffs' horses. Rather, the refusal to assign stall space was the basis for the plaintiffs' section 2 Sherman Act antitrust claim, which was dismissed by the district court. That dismissal was not appealed.

Upon appeal, the Guzowskis advanced the argument that the racing secretary, although required to do so by statute, failed to

Appendix B

Judge Churchill, in dismissing the 42 U.S.C. section 1983 cause of action in the 1981 complaint, correctly determined that the state's regulation of the horse racing industry did not include the allocation of stall space and that the state's regulation of horse racing in Michigan and its derivation of tax revenues from the racetracks did not support a "close nexus" nor "symbiotic relationship" between the state and the racetracks so that the actions of the racetracks could be fairly treated as the actions of the state. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51, 95 S. Ct. 449, 453 (1974); *Moose Lodge No. 1107 v. Irvis*, 407 U.S. 163, 173-77, 92 S. Ct. 1965, 1971-73 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-26, 81 S. Ct. 856, 861-62 (1961). Judge Churchill necessarily considered the role and authority of the racing commissioner in concluding that the 1981 complaint and its section 1983 cause of action failed to state a claim, and the Guzowskis have not alleged any other facts that, even if liberally construed, would support the state action requirement of a section 1983 claim. Thus, the district court in the instant action properly dismissed this cause of action as barred by the doctrine of issue preclusion.

To initiate an action under section 1985(3), a plaintiff must be a member of a class that traditionally receives protection under the suspect classification analysis of the Fourteenth Amendment. *See, e.g., National Communication Systems, Inc. v. Michigan Public Service Comm'n*, 789 F.2d 370, 374 (6th Cir.), *cert. denied*, 479 U.S. 852 (1986). Judge Churchill dismissed the previous section 1985(3) cause of action, which had been

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properly manage tattooers, timers, guards, and others at the tracks, who in turn engaged in improper conduct involving the Guzowskis. The 1984 complaint advanced no such allegation and avoided any affirmative assertion that the racing secretary knew or should have known that any such violations or irregularities had occurred.

Moreover, assuming arguendo that such allegations of improper management were charged in the complaint, they would not have constituted the required "state action" to support a 42 U.S.C. section 1983 cause of action.

incorporated into the 1981 complaint, because the Guzowskis admitted there was no invidious class or race based discrimination and that they were not members of any protected class. Because the Guzowskis have not alleged membership in such a group in the 1984 complaint, and because they have not alleged any facts which liberally construed would give rise to a conclusion that they were in such a group, this district court in the instant action properly found the section 1985(3) cause of action barred by the doctrine of issue preclusion.

Since the Sherman Act section 1 count and the RICO count fail to state a claim, and since the Sherman Act section 2 count, the section 1983 count, and the section 1985(3) count are barred by the doctrine of issue preclusion, the district court's judgment dismissing the complaint in its entirety is AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MAY 29, 1990

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.A. No. 84-3456-AA

HON. GEORGE La PLATA

FRANK GUZOWSKI, et. al.,

Plaintiffs,

vs.

BERNARD HARTMAN, et. al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On May 9, 1990, this Court entered an Order granting Defendant's Motion to Dismiss Complaint. The matter is now before the Court on Plaintiff's Motion for Reconsideration.

Pursuant to Local Rule 17(m)(3), motions for reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant must not only demonstrate a palpable defect by which the Court and the parties have been misled, but also must show that a different disposition of the case must result from a correction thereof.

Appendix C

In the instant case, Plaintiff's motion merely raises issues and proffers arguments that were previously considered and rejected by the Court. Therefore, finding that Plaintiff has not met his burden under Local Rule 17(m)(3), the Court DENIES their Motion for Reconsideration.

s/ George La Plata
George La Plata
U. S. District Judge

May 29, 1990
Ann Arbor, MI

[stamped]
A TRUE COPY
CLERK, U. S. DISTRICT COURT

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MAY 9, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.A. No. 84-CV-3456-AA

HON. GEORGE LaPLATA

FRANK GUZOWSKI, et. al.,

Plaintiffs,

vs.

BERNARD HARTMAN, et. al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On May 24, 1989, pursuant to the mandate of the Sixth Circuit, this court reinstated an action originally filed in this Court on July 25, 1984. Currently before the Court is defendants' renewed motion to dismiss under Fed. R. Civ. P. 12(b)(6). For purposes of this motion to dismiss, the allegations of the complaint must be taken as true. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

The plaintiffs are owners and trainers of thoroughbred horses in Michigan. An owner or trainer of thoroughbred horses can only race his horses at a thoroughbred track, during a thoroughbred race meet. During the time relevant to this lawsuit, there were only two racetracks in the State of Michigan which conducted thoroughbred

horse racing. These tracks are the Hazel Park Race Course and Detroit Race Course. Hazel Park Race Course is owned and operated by Hazel Park Racing Association, Inc. and the Detroit Race Course is owned and operated by the Detroit Racing Association, Inc. Both corporations are owned by defendants Hartman and Tyner. Defendant Sears was the Racing Secretary at both tracks.

The defendants were licensed by the State of Michigan to conduct thoroughbred race meets at both tracks. Defendants, by virtue of their control of the tracks, also acquired control of the stalls adjacent to the tracks used for stabling horses. These stalls are not directly subject to state regulation. Detroit Race Course has about 1,500 stalls, and Hazel Park Race Course about 1,200 stalls. This constitutes a substantial percentage of the number of thoroughbred race stalls within reasonable distance of the tracks. The stalls are provided to the horsemen at no charge.

The tracks provide a competitive purse for each race which is run during a race meet. The size and distribution of the competitive purses is generally established by a collective bargaining agreement between the Michigan Division of the Horsemens Benevolent and Protective Association, as bargaining agent for the horsemen, and the tracks. These purses are the monetary inducement for horsemen to race their horses at the track.

The track profits are derived primarily from horse-race gambling which is one of the only lawful forms of gambling in the State of Michigan. The profit to the track is derived from the customers who purchase tickets to come into the track to watch the races, and also from bets placed on the various horse races.

The tracks do not own or train horses and do not race horses in

competition with horsemen and, conversely, the owners and trainers do not conduct thoroughbred race meets. However, the tracks are the sole outlet for the horsemen's services.

Prior to 1979, the Guzowskis had been critical of track managment and had acted in Lansing to promote state legislation favoring horsemen. Between 1979 and 1981, four of the Guzowski horses were injured at the track and one of these horses subsequently died. In 1979, a horse owned by the Guzowskis had its tail wrapped around the starting gate at the beginning of a race. When the horse broke from the gate, it crushed several vertebrae in its spine. The Guzowskis commenced suit in the Macomb County Circuit Court against Detroit Racing Association seeking damages for the injury to the horse. The lawsuit was decided by a jury in 1981, and resulted in a verdict in favor of the Guzowskis in the amount of $136,000.00. The allocation of stall space at the track came up for review three days later, and the Guzowskis were allocated no stalls. Thereafter, although they continued to apply for spaces, they were never again allocated stalls by the Racing Secretary.

The Guzowskis first filed a lawsuit in federal court against defendants in 1981. The 1981 complaint alleged that the defendants were determined to drive the Guzowskis out of the field of thoroughbred racing in Michigan by concertedly denying the plaintiffs racing privileges and opportunities at the Detroit Race Course and Hazel Park Race Course in violation of §§1 and 2 of the Sherman Antitrust Act for violation of antitrust laws, under §§1983 and 1985(3) of the Civil Rights Act for violation of constitutionally protected rights; and for state law claims for breach of contract and tort.

In May 1982, Judge Churchill dismissed the antitrust claims

and the civil rights claims. However, the Court reasoned that since the allocation of stall spaces was not regulated by the State, this was not excluded from antitrust scrutiny. The opinion concluded:

> The plaintiffs will therefore be permitted to amend their complaint to set forth an antitrust claim against the non-state defendants with respect to the denial of stall space and any state claims pendent thereto.

Guzowski v. Hartman, No. 81-74669, slip op. at 4 (E.D. Mich., Dec. 15, 1981). An amended complaint was filed but it was essentially unchanged. Consequently, in August 1982, Judge Churchill granted the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The Guzowskis appealed the dismissal of the count alleging refusal to deal involving the denial of stall space at the tracks to the Sixth Circuit Court of Appeals. They contended that the District Court erred in dismissing the suit since the facts pled in the complaint were sufficient to sustain a cause of action for refusal to deal. On November 28, 1983, in an unpublished per curiam opinion, the Sixth Circuit panel held that the only conspiracy alleged in the "restraint of trade" section of the amended complaint was a conspiracy to illegally obtain sole control and use of the only licenses available for thoroughbred horse racing. Because the amended complaint did not allege a separate antitrust violation of refusal to deal involving the denial of stall space, the judgment of the District Court was affirmed. The opinion concluded with the following: "We note, however, that dismissal for failure to state a claim is without prejudice, and the Guzowskis are free to file a new complaint." *Guzowski v. Hartman*, No. 82-1819, slip. op. at 9 (6th Cir., Nov. 28, 1983).

Appendix D

The Guzowskis filed the complaint currently before this Court in 1984. The complaint alleges a Sherman Act refusal to deal claim, a claim under the Clayton Act, 15 U.S.C. §§14, 25, a §1983 claim against defendant Sears in his capacity as Racing Secretary of the Detroit Race Course and of Hazel Park Race Course, a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) alleging an antitrust conspiracy, and three pendent state claims.

The defendants filed a motion to dismiss or for partial summary judgment on the grounds of res judicata. This Court adopted Magistrate Carlson's Report and Recommendation of dismissal for the reason that the 1984 complaint simply restated the course of wrongful conduct that had been the subject of the 1981 suit. This Court interpreted the panel's statement "that a dismissal for failure to state a claim is without prejudice" as dictum and thus claim preclusion should bar the 1984 suit. The Guzowskis again appealed to the Sixth Circuit.

On June 20, 1988, the Sixth Circuit panel stated:

> It is well established that the sustaining of a motion to dismiss for insufficiency of the complaint serves as an adjudication on the merits *unless* the court specifies otherwise. [citation and footnote omitted] While the District Court in 1981 suit made no express reservation of the Guzowskis' right to maintain a second action, the opinion of the Sixth Circuit clearly modified the judgment of the District Court . . .
>
> Although it is therefore clear that the Guzowskis are not completely barred from

bringing the complaint set out in the 1984 suit, it is not quite as obvious which specific theories of recovery they are entitled to litigate. *When the Guzowskis appealed the dismissal of the 1981 suit, they only appealed what they perceived to be their refusal to deal allegation.* Thus the opinion of the Sixth Circuit modifying the judgment of the district court in the 1981 case is final with respect to the other theories in the 1981 complaint. Therefore, while claim preclusion does not bar the Guzowskis from bringing the 1984 suit, issue preclusion will bar the relitigated of whatever theories of recovery in the 1981 suit were not appealed.

Any theory of recovery that the Guzowskis pleaded in the 1981 suit which the District Court determined failed to state a claim and which the Guzowskis failed to appeal is thus precluded. That does not mean, however, that any facts that were the predicate for one of the Guzowskis now-precluded theories of recovery have been "actually litigated" and decided against the Guzowskis. All that was "actually litigated" in the District Court in the 1981 suit was whether the Guzowskis' complaint stated a claim upon which relief could be granted. Thus the Guzowskis are precluded from bringing an action based upon one of the theories of recovery from the 1981 suit that was not appealed, but they are precluded, in the course of litigating their

> claims in the 1984 suit, from litigating the facts upon which the earlier suit was based. While the determination of which of the Guzowskis' multiple theories of recovery are precluded is for the District Court on remand, at a minimum the Guzowskis refusal to deal theory of recovery and their RICO theory of recovery are not precluded, because those theories arise out of the claim which was previously appealed to this Court.
>
> Accordingly, the judgment of the District Court on the res judicata issue is reversed, and the case remanded to the District Court for the application of the doctrine of issue preclusion, as explained above, to the claims in the 1984 complaint and for further proceedings.

Guzowski v. Hartman, 849 F.2d 252, (6th Cir. 1988) (emphasis added).

Applying the precepts in the Sixth Circuit mandate to the 1984 complaint, this Court concludes that the claim that defendants violated plaintiffs' due process and equal protection rights under both 42 U.S.C. §1983 and the Fifth and Fourteenth Amenments to the United States Constitution are precluded since these claims are based upon theories of recovery from the 1981 suit that were not appealed. In his opinion, Judge Churchill concluded that the Guzowskis' allegations that denial of stall space violated their civil rights failed to state a claim. The Court dismissed the §1983 claim for the reason that the plaintiffs failed to show that there was any state action in the denial of stall space. Judge Churchill found that with regard to the §1985(3) claim, the plaintiffs admitted that there

was no invidious class or race based discrimination and that the Guzowskis are not members of any protected class. Accordingly, this Court grants Defendants' Motion to Dismiss as to Counts IV and V on the grounds of issue preclusion.

The remaining counts allege a Sherman Act refusal to deal claim, a claim under the Clayton Act, 15 U.S.C. §§14, 25, a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) alleging an antitrust conspiracy, and three pendent state claims.

In their complaint, the plaintiffs allege:

> The defendants Hazel Park Racing Association, Inc. and Detroit Racing Association, Inc. have delegated to defendant Sears, in his capacity as Racing Secretary, their entire power to determine which breeders, owners and trainers will be allocated stable space at Hazel Park Race Track and Detroit Race Course. They denied plaintiffs the ability to occupy any stall space at either track, even at such times when there were numerous empty stalls on the tract premises. That as a result of the foregoing actions, as well as others hereinafter specified, the ability of the plaintiffs to carry on their business has been virtually destroyed. That the defendants have combined to use their monopoly of stable space to determine which horses will and which horses will not have a fair competitive position, in restraint of trade and free competitive access to the horse racing industry.

Appendix D

Complaint filed July 25, 1984.

To establish their claim that the defendants illegally refused to deal with plaintiffs in violation of §1 of the Sherman Act, four elements must be shown:

1) the defendant entered into an agreement or conspiracy;

2) this agreement or conspiracy was an unreasonable restraint of trade, e.g., the purpose of the conspiracy was to illegally fix prices or illegally refuse to deal;

3) the agreement or conspiracy restrained or affected interstate or foreign commerce; and

4) the plaintiffs were injured in their business or property as a result of the defendants' actions.

Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196 (6th Cir. 1982).

Defendants argue that the alleged concerted activities by Hazel Park Racing Association and Detroit Racing Association to deny the plaintiffs stall space does not qualify as a contract, combination or conspiracy for the purpose of §1. Defendants rely on *Copperwald Corp. v. Independent's Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed. 628 (1984), where the Supreme Court held that a parent can not conspire with its wholly owned subsidiary for the purposes of §1 of the Sherman Act. The Court

expressed as the basis for its decision the unity of purpose shared by the parent and its subsidiary:

> A parent and its wholly owned subsidiary have a complete unity of interests... With or without a formal 'agreement', the subsidiary acts for the benefit of its parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for §1 scrutiny. *Id.* at 771.

Moreover, the Sixth Circuit has held that *Copperweld* precludes a finding that two wholly owned sibling corporations can combine for the purposes of §1, *Directory Sales Management Corp. v. Ohio Bell Telephone Company,* 833 F.2d 606 (6th Cir. 1987). The reasoning of these cases supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under §1.

Here we have two separate corporations which are wholly owned by the same shareholders. The separate incorporation, standing alone, does not necessarily imply a capacity to conspire. When both corporations are commonly owned, the separateness of the corporations—whether there is separate control of each corporations's day-to-day operations, separate officers, separate corporate headquarters, and so forth—are not sufficient factors to describe a separate economic entity for purposes of the Sherman Act. These factors cannot overcome the basic fact that the ultimate interests of the corporations are identical and, therefore, they must be viewed as a single economic unit. Both corporations act for the

economic benefit of common shareholders. Because the corporations in reality have a "unity of purpose or common design," neither can conspire with one another. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

The illegal monopolization claim under §2 of the Sherman Act has five distinct elements:

> (1) the defendants had monopoly power in a relevant market during the period alleged in the complaint;
>
> (2) the defendants' monopoly power concerned goods and/or services in interstate or foreign commerce;
>
> (3) the defendants acquired or maintained such monopoly power knowingly;
>
> (4) the defendants acquired or maintained such monopoly power through anticompetitive conduct; and
>
> (5) the plaintiffs were injured in their business or property as a result of the defendants' actions.

United States v. Grinnell Corp., 384 U.S. 563, 580, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

In *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979), the Sixth Circuit discussed when a monopolist has a duty to deal:

Appendix D

> There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward "intent" test which holds that a business is free to deal with whomever it pleases so long as it has no "purpose to create or maintain a monopoly." The second has been styled as promulgating the "bottleneck theory or antitrust law." Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

Applying the foregoing analysis to the facts of this case, while this Court finds the allegations sufficiently state that the defendants possess monopoly power with regard to the allocation of stall spaces, the plaintiffs do not allege that the defendants are competitors. Therefore, the Court concludes that the plaintiffs cannot state a claim with regard to an essential element under §2 of the Sherman Act.

Plaintiffs allege that defendants refusal to renew the Guzowskis' "lease" or stall space is a violation of Section 3 of the Clayton Act, 15 U.S.C. §14. Section 3 prohibits discrimination only in the lease or sale of "commodities." The language of the Act indicates that "commodity" means tangible, physical, movable articles of commerce. The courts have consistently confined application of the Act to tangibles. The Act does not apply to leases of realty. See *Export Liquor Sales Inc. v. Ammex Warehouse Co.*, 426 F.2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). The facts of this case do not fall within the ambit of this provision of the Clayton Act.

Appendix D

Because the plaintiffs cannot allege an antitrust conspiracy based on the refusal to deal, the alleged activity cannot satisfy the predicate acts requirement under RICO.

Federal jurisdiction over the Michigan law claims, which are based upon the same facts as the federal claims, is solely because of pendent jurisdiction. Unlike a claim involving a federal question, the adjudication of a pendent claim is committed to the district court's discretion and is not mandatory. *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 n. 2 (6th Cir. 1978).

For the reasons set forth in this opinion, the Court GRANTS Defendants' Motion to Dismiss. The complaint will be DISMISSED on May 23, 1990, so no discernable prejudice will result from requiring the plaintiffs to prosecute their state claims in the state courts of Michigan.

s/ George La Plata
George La Plata
U. S. District Judge

May 9, 1990
Ann Arbor, MI

[stamped]
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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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APPENDIX E — COMPLAINT AND DEMAND FOR JURY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JULY 24, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK GUZOWSKI, THERESA GUZOWSKI, LORRAINE GUZOWSKI, RAYMOND GUZOWSKI, and DONALD GUZOWSKI,

Plaintiffs,

vs.

BERNARD HARTMAN, HERBERT TYNER, JAMES KAROUB, OXFORD BUILDING COMPANY, DETROIT RACING ASSOCIATION, INC., HAZEL PARK RACING ASSOCIATION, INC., and EMANUEL J. SEARS, Jointly and Severally,

Defendants.

P. DAVID PALMIERE (P26796)
Attorney for Plaintiffs

COMPLAINT AND DEMAND FOR JURY

NOW COME Plaintiffs, by and through their attorneys, BEIER, HOWLETT, HAYWARD, McCONNELL, McCANN, JONES, KINGSEPP & SHEA, and for their complaint say:

1. That Plaintiffs are residents of the State of Michigan and otherwise subject to the jurisdiction of this Honorable Court;

2. That the Defendants Bernard Hartman, Herbert Tyner, Emanuel J. Sears and James Karoub, (hereinafter "Hartman", "Tyner", "Sears", and "Karoub"), are individuals who are Michigan citizens, Michigan residents, and have their principal places of business in the State of Michigan, and are otherwise subject to the personal jurisdiction of this Honorable Court;

3. That the Defendants Oxford Building Company, Detroit Racing Association, Inc., and Hazel Park Racing Association, Inc., are Michigan corporations which are citizens of the State of Michigan and have their principal place of business in Michigan as further set forth in this Complaint, and are otherwise subject to the personal jursidiction of this Honorable Court;

4. That subject matter jurisdiction is conferred upon this Honorable Court by 28 USC 1331, by reason of substantial federal questions and causes of action involved herein;

5. That the amount in controversy exceeds the sum of $10,000.00;

6. That the causes of action herein pleaded arise out of acts, transactions and occurrences primarily but not entirely occuring within the State of Michigan;

COUNT I
GENERAL FACTUAL ALLEGATIONS

7. That the Defendant Oxford Building Company is the owner of the Detroit Race Course, a business establishment conducting licensed race meets for thoroughbred horses in the State of Michigan;

Appendix E

8. That the Detroit Racing Association, Inc., is the operating company for the Detroit Race Course;

9. That Hazel Park Racing Association, Inc., is the owner and operator of the Hazel Park Race Course; and business establishment holding itself open for the conduct of licensed race meets for thoroughbred horses in the State of Michigan;

10. That Defendants Hartman and Tyner, individually or through an interlocking corporate structure, have economic interest in and derive gain from Detroit Race Course and Hazel Park Race Course;

11. That Defendant Sears is and at all material times hereto has been the Racing Secretary of Detroit Race Course and the Racing Secretary of Hazel Park Race Course;

12. That Hazel Park Race Course and Detroit Race Course are the only two tracks in the State of Michigan which conduct thoroughbred horse racing;

13. That the racing of thoroughbred horses at these two tracks in the State of Michigan generates an excess of $175,000,000.00 in gambling revenues each year;

14. That Plaintiffs comprise a family which has for 20 years been active in the owning, breeding and training of thoroughbred horses for thoroughbred racing in the State of Michigan;

15. That Plaintiffs, and particularly Plaintiff Lorraine Guzowski, have been active with the office of the Racing Commissioner and the State Legislature, in seeking to implement fair and reasonable rules of racing, to police racing to make it fair

and equitable for participants and the public, and in actively compaigning against the concentration of power inherent in the ownership structure of the race tracks, culminating in the Racing Law of 1980, which required *inter alia* that one of the tracks be divested by its current ownership;

16. That in March, 1979, Plaintiff Frank Guzowski filed suit in the Macomb County Circuit Court for damage to a race horse which occurred when the horse's tail was wrapped around or tied to the starting gate at Detroit Race Course;

17. That on or about June 10, 1981, the jury in the Macomb County Circuit Court case returned a verdict in the amount of $136,000.00 against Detroit Racing Association, Inc., and in favor of Plaintiff;

18. That after the Plaintiffs' involvement with the Racing Law of 1980, after the Plaintiffs' commencement of the lawsuit in March, 1979, and most particularly after the verdict was returned in the lawsuit in June, 1981, the Defendants, among themselves and by agreement, determined to drive the Plaintiffs out of the field of thoroughbred racing in the State of Michigan, to punish Plaintiffs for that lawsuit and to make the Plaintiffs an object lesson and example for the thousands of other thoroughbred breeders, owners and trainers in the State of Michigan, and for other malicious, willful and wanton motives as will hereinafter be set forth;

19. For the purpose of implementing their unlawful scheme, Defendants agreed to do, and did, each of the following:

A. They refused to allow Plaintiffs' horses on the grounds of either race track, for any purpose;

B. They refused, from time to time, to permit Plaintiffs to come onto either race track, for any purpose;

C. They withheld badges and passes required for identification before persons are admitted to the "back side" of the track, where the business of racing is done;

D. They refused to accept entries of Plaintiffs' horses in races, and tore up entry papers which were submitted;

E. They refused to register Plaintiffs' horses as eligible horses for any race conducted at either track;

F. They published false, malicious and demeaning allegations of and concerning the Plaintiffs, that any person who was employed by the Guzowski family would be sued if they handled the Guzowski horses thereby inducing persons in the thoroughbred industry not to work for Plaintiffs;

G. They denied Plaintiffs the ability to occupy any stall space at either track, even at such times when there were numerous empty stalls on the track premises;

20. That as a result of the foregoing actions, as well as others hereinafter specified, the ability of the Plaintiffs to carry on their thoroughbred horse business has been virtually destroyed, and Plaintiffs have been held up to ridicule, embarrassment, and humiliation;

COUNT II
VIOLATIONS OF THE SHERMAN ACT, 15 USC 1, 2

A. Unlawful Boycott and Conspiracy to Boycott

21. Plaintiffs hereby incorporate the allegations of the

preceding paragraphs as though set forth herein in full;

22. That the Defendants, and each of them, agreed that the Plaintiffs should be allowed no access to thoroughbred racing in the State of Michigan, which is only conducted at the two thoroughbred tracks owned by Defendants and licensed by the State of Michigan;

23. That in furtherance of this conspiracy, Defendants instituted a general boycott against the Plaintiffs, such that by the variety of strategems, artifices and outright denials set forth above, Plaintiffs would be prevented from doing any business at Hazel Park Race Course or Detroit Race Course, and would be prevented from operating their business in thoroughbred racing in the State of Michigan;

24. That this agreement, and the overt acts which put it into effect, constitute a conspiracy to boycott and the imposition of a boycott which acted in restraint of trade in the thoroughbred racing industry;

25. That by virture of the acts of Defendants, Plaintiffs were denied access to the thoroughbred racing industry in the State of Michigan, which define respectively the relevant market and relevant geographic area for the determination of restraint of trade, in that:

A. Owners and trainers, and race tracks, are licensed by the State of Michigan within its territorial borders;

B. There is a recognized Michigan industry having to do with breeding, raising, training and racing of "Michigan-bred" thoroughbred horses;

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C. State regulation of the thoroughbred industry varies from state to state and the Michigan regulation of its own thoroughbred industry exists within the State;

D. The state government, and particularly the state racing commission, as the state agency charged with the enforcement of rules and regulations respecting thoroughbred racing in the State of Michigan, has long recognized a "Michigan thoroughbred industry", and have offered special races, purses and prizes for "Michigan-bred" horses;

E. Before horses may be taken from Michigan out of state, licensing and racing rules and requirements of the foreign state must be observed; and for any horse to come from outside the State of Michigan into Michigan to race, any additional requirements of the Michigan rules and regulations regarding thoroughbred racing must be observed;

F. That the great majority of horses racing in Michigan have their permanent stabling in Michigan and their owners are residents of Michigan;

G. That the great majority of horses with permanent stabling in Michigan whose owners are residents of Michigan are not taken outside the State for thoroughbred racing.

26. That because the Defendants conspired to impose a boycott, and did impose a boycott, restraining trade withing the relevant market and geographic area. Defendants are guilty of a *per se* violation of the Sherman Act, 15 USC Sec. 2, and Plaintiffs are entitled to treble damages;

B. Misuse and Abuse of State Granted Monopoly Powers

27. Plaintiffs herein incorporate by reference the allegations

of the preceding paragraphs as though set forth herein in full;

28. That the State of Michigan has, by statute, determined that horse racing should only be permitted in the State of Michigan on a licensed track, and that the number of such tracks licensed in a "city area" should be limited, MCLA 431.67, 68;

29. That Defendants Oxford Building Company and Hazel Park Racing Association, Inc., have for years applied for and received the only two thoroughbred track licenses and thoroughbred race meet licenses issued in the State of Michigan;

30. That by virtue of the grant of their license applications, Defendants Oxford Building Company and Hazel Park Racing Association, Inc., have obtained from the State of Michigan a grant of monopoly power insofar as they control all thoroughbred racing in the State of Michigan;

31. That a grant of monopoly power by a state licensing agency is not immunized from federal anti-trust regulation if the monopoly power is used for an improper, unlawful or illegal purpose;

32. That Defendants Oxford Building Company and Hazel Park Racing Association, Inc., have abused and misused their monopoly power, and have permitted the other Defendants to also abuse and misuse such power, individually and by agreement, for the purpose of eliminating the Guzowski family from the thoroughbred racing marketplace;

33. That the purpose set forth in the preceding paragraph is not a legitimate or proper purpose for which the state granted monopoly powers to these Defendants, and constitute an improper

abuse and misuse of such monopoly power, giving rise to liability for the Defendants under Section 1 of the Sherman Act, 15 USC Section 1, for which Plaintiffs are entitled to treble damages;

C. Monopoly of Stall and Stable Space

34. Plaintiffs herein incorporate by reference the allegations of preceding paragraphs as though set forth herein in full;

35. That the maintenance of stall or stable space for horses at the Detroit Race Course and Hazel Park Race Course is not within the jurisdiction of the Racing Commissioner and not within the purview or ambit of the rules and regulations of racing, but is a matter of private enterprise involving Defendants;

36. That Defendants, by agreement and acting in concert, have attempted to control, monopolize and govern in its entirety the allocation of stable space with access to either race track, and have monopolized the provision of stable space with access to each race track;

37. That because it is impractical to expect success from race horses who must be shipped from the farm to the race track on the day of their race, the ability to stable a horse in one of the stalls on the race track is a very significant factor governing a horse's prospects for success in the race itself;

38. That for the foregoing reasons, the ability to allocate stable space is, in fact, the ability to preclude a horse from making a successful showing in competitive racing;

39. That Defendants have combined to use their monopoly of stable space to determine which horses will and which horses will

not have a fair competitive position, in restraint of trade and free competitive access to the horse racing industry;

40. That these actions of Defendants are violations of Sections 1 and 2 of the Sherman Act, 15 USC 1, 2, for which Plaintiffs may have treble damages.

COUNT III
VIOLATION OF THE CLAYTON ACT

41. Plaintiffs hereby incorporate by reference the allegations of the preceding paragraphs as though set forth herein in full;

42. That Defendant Hazel Park Racing Association, Inc., has delegated to Defendant Sears, as its Racing Secretary, its entire power to determine which breeders, owners and trainers will be allocated stable space at Hazel Park Race Track;

43. That Defendant Detroit Racing Association, Inc., has delegated to Defendant Sears, in his capacity as Racing Secretary, its entire power to allocate stable space among breeders, owners and trainers at Detroit Race Course;

44. That by virtue of the combination of Defendants in granting the power to allocate stable space at each race track to Defendant Sears, Defendants have jointly and severally obtained a coercive threat which is used to punish any breeders, owners or trainers of thoroughbred horses in the State of Michigan who do not agree to acts and practices of Defendants calculated to increase Defendants' profits and hold down costs including monetary returns to horsemen within the State of Michigan;

45. That Defendants have from time to time exluded persons,

including Plaintiffs, from stable space thereby effectively excluding them from fair participation in racing, for the purpose of making examples of these persons to gain a coercive advantage over other horsemen in the thoroughbred industry and for the purpose of fixing costs and prices in restraint of trade, in violation of the Clayton Act, 15 USC Section 14, 25, for which Plaintiffs are entitled to treble damages;

COUNT IV
VIOLATION OF THE CIVIL RIGHTS ACT

47. Plaintiffs hereby incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

48. That the Defendants have acquired their power over the Michigan thoroughbred racing industry by virtue of a state grant of monopoly in the licenses for the conduct of race tracks and racing meets for thoroughbred horses in the State of Michigan;

49. That much of the anticompetitive action and action in restraint of trade against the Plaintiffs on the part of the Defendants has been accomplished by the actions of Defendant Sears, who holds the position of Racing Secretary at Hazel Park Race Course and as Racing Secretary of Detroit Race Course;

50. That the position of racing secretary is a position created by regulations of the Michigan Racing Commission, a state agency charged with the promulgation of rules and regulations and the interpretation of statutes governing horse racing in the State of Michigan;

51. That Regulation 34 of the "The Rules and Regulations

Governing Thoroughbred Horse Racing" in the State of Michigan defines the "race officials" as follows:

> 34. Officials of a race meeting are as follows: 3 stewards; 3 placing judges; 2 or more patrol judges; clerk of scales; paddock judge ; official starter; *racing secretary,* who may also be a handicapper; timer; official veterinarian and horse identifier.

52. That the duties of the racing secretary, a position created and mandated by state law, include those duties specified in Regulation 51 of the "Rules and Regulations Governing Thoroughbred Horse Racing" of the State of Michigan;

> 51. The racing secretary shall discharge all duties expressed or implied required by the rules of racing, and he shall report to the stewards all violations of the rules or regulations of the meeting.

53. That the horse racing industry is the subject of a pervasive scheme of regulation by the state, in the furtherance of which the state has created the position of racing secretary and vested in the racing secretary the duty and responsibility to insure that the rules and regulations appertaining to thoroughbred horse racing are followed, and to report all violations thereof;

54. That the actions of the racing secretary constitute state action, within the purview of the Civil Rights Act, 42 USC 1983 *et seq;*

55. That Defendant Sears, acting by virtue of his authority as Racing Secretary at Hazel Park Race Course and Detroit Race

Course, and by virtue of and under color of state law, has engaged in the activities aforedescribed, for the express purpose of driving the Plaintiffs from the racing industry in the State of Michigan, and depriving them of their livelihood and the opportunity to pursue their chosen trade and occupation, all of which constitute a deprivation of their civil rights and liberties under color of state law in violation of 42 USC § 1983;

COUNT V
CONSTITUTIONAL TORT

56. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

57. That the United States Constitution, Amendment Fourteen, guarantees and secures to the citizens of the United States the right to due process of law and equal protection under the law;

58. That the Defendants, individually and in concert, have singled Plaintiffs out for treatment under law which is accorded to no other owner, breeder or trainer of thoroughbred horses in the State of Michigan, and have attempted to deprive and have deprived the Plaintiffs of the right to pursue their chosen trade and occupation, within the State of Michigan, under color of state law, but without due process of law, in that Plaintiffs have a license from the government of the State of Michigan to pursue their trade and business as owners and trainers of thoroughbred horses in Michigan, which right has been denied them without hearing and for malicious, willful, wanton, arbitrary and capricious purpose and motive, by the Defendants acting under color of state law, in violation of the constitutional guarantees aforesaid;

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COUNT VI
VIOLATION OF STATE ANTI-TRUST LAW

59. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

60. That, for the reasons set forth in preceding paragraphs, Defendants have attempted to monopolize and have monopolized thoroughbred horse racing and racetrack stable space, and have exercised their monopoly power in a concerted boycott, all for the purpose of restraining trade, restricting the allocation of stable space among thoroughbred owners and trainers in the State of Michigan, and for the purpose of driving Plaintiffs from the thoroughbred industry within this state;

61. That the said actions, as described, violate the Michigan Anti-Trust Law, MCLA 445.701-712, MCLA 445.761-767;

COUNT VII
TORT OF OUTRAGE

62. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

63. That the conduct of the individual Defendants was willful, malicious, and without any justification or excuse, and the conduct of Defendants as described constitutes conduct which is so far beyond the bounds of civilized behavior as to constitute conduct intolerable in a civilized society, with respect to the Plaintiffs;

64. That as a proximate consequence of the intentional misconduct of the Defendants, Plaintiffs have suffered

humiliation, mortification and embarassment, loss of business opportunties, and costs and expenses arising out of Plaintiffs attempts to maintain their position within the Michigan thoroughbred industry;

COUNT VIII
WRONGFUL DEPRIVATION OF STATE LICENSE

65. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full.

66. That the State of Michigan requires a person who is acting as a trainer of thoroughbred horses in the State of Michigan to be licensed as a trainer of thoroughbred horses in this state;

67. That at all times material hereto, Plaintiff Lorraine Guzowski was licensed as a trainer of thoroughbred horses in the State of Michigan;

68. That it is implicit within the granting of a license by the state, that such a person is permitted to do all things which a trainer of thoroughbred horses is otherwise permitted to do, including entry of those horses at state licensed tracks within the State of Michigan;

69. That the Defendants, individually and in concert, have taken it upon themselves to deny Plaintiff the privileges and prerequisites appertaining her state license, and have gone so far as to declare through Defendant Scars that "your license is just a piece a paper" and that "your license doesn't entitle you to a thing", including the right to enter horses in thoroughbred race meets within the state, and such right has been denied Plaintiff by the

wrongful acts of Defendants;

COUNT IX
INTERFERENCE WITH PROSPECTIVE ADVANTAGE

70. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

71. That prior to the institution by the Defendants of their unconscionable and unlawful course of conduct with respect to the Plaintiffs, Plaintiffs had an established position within the thoroughbred industry in Michigan, were in the habit of racing thoroughbred horses at Michigan race tracks, and had engaged in such pursuits profitably as a family business for a number of years;

72. That Defendants knew of Plaintiffs' position within the thoroughbred industry, and knew that Plaintiffs intended that the beneficial relationships they enjoyed between themselves and other horse owners, between themselves and jockeys, and other employees, and between themselves and the race tracks should continue in the future;

73. That the Defendants knew that their course of conduct would destroy the prospective advantage which Plaintiffs intended to enjoy in the coming years, with respect to their postion in thoroughbred racing, and in fact Defendants acted for the express purpose of depriving the Plaintiffs of that prospective advantage, wrongfully, maliciously, and without justification;

74. That the Defendants' actions, as set forth hereinbefore, did in fact deprive the Plaintiffs of their advantageous relationships with the other participants in the thoroughbred industry in Michigan, to the point where the Plaintiffs have been

driven from the industry effectively by the acts of Defendants;

COUNT X
RICO ACT

75. Plaintiffs hereby incorporate the allegations of the preceding paragraphs as though set forth herein in full.

76. That the corporate Defendants, acting through their servants, agents and employees, have during the past ten years engaged in a course of conduct including the following:

A. Ignoring the positive results of tests on horses indicating the presence of proscribed drugs, not subject to medication approvals or orders, failing to report such results to the stewards, failing to take any action toward disqualification of said horses;

B. Accepting as proper medication reports information on medical reports which were signed in blank, to be filled in after the races were run and after the test results were returned;

C. Switching of urine samples in the spit box to allow unlawfully drugged or medicated horses to run in races;

D. Forcing a horse to run in a race, even though illegal conduct was suspected or discovered which should properly have disqualified the said horse;

E. Wrapping or tying the horse's tail to the gate, for the purpose of delaying its start and impairing its running in the race;

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F. Mishandling a horse so that the horse's head is turned, pulled or lifted at the moment of the start, in order to disfavor that horse in the running of the race;

G. Controlling the timing of the gate to commence the race for the advantage of a given horse;

H. Improper use of tongs on the ears or tail of a horse in order to impair that horse's ability to run in a race;

I. Manipulating the post-position draw so that identified horses are given favored post positions.

J. Use of interstate telephone to induce out-of-state owners to bring horses in for entry in a race, after the other entries in the race have been determined, and disclosure to such additional owners of the other entries of the race together with the appraisal that the recommended horse being brought in to run in that specific race will win the race;

K. Manipulating the entry board to show fewer entries than actually made, providing an unusually high number of extra races outside the race book, so that races in which certain horses are favored can be held and other races can be cancelled;

L. Permitting unlicensed trainers to run horses at Defendants' tracks;

M. Allowing untattooed horses to run at Defendants tracks;

N. Employing an unlicensed tattooer to tattoo horses;

O. Manipulating the conditions of entry for certain races such that specific horses are virtually certain to win such a race;

P. Denying entry in races to qualified horses, upon pretext or without giving any reason whatsoever;

Q. Influencing jockies to ride well or poorly for the purpose of manipulating the outcome of a race;

R. Entering horses in races without the prior consent of the owner or trainer;

S. Manipulating the surface cushion on the track so as to make the cushion harder for certain favorite horses who like a hard track;

T. Watering the surface of the track unevenly so that some horses have sure footing and some do not;

U. Allowing horses to be turned loose in the stable area, and taking no action to restable a loose horse, on the night before that horse is to run in a race, to disadvantage that horse in a race;

V. Making of threats against persons identified as witnesses in federal litigation;

77. That the foregoing acts are illegal acts, under state law, punishable by imprisonment for more than one year, MCLA 431.85; and are further illegal under federal law, 18 USC 1084, 18

USC 1503; and, there being more than five persons involved, said acts are in violation of 18 USC 1955;

78. That more than two of the acts and activities specified in Paragraph 76 of this Complaint were accomplished within the last ten years;

79. The said course of conduct constitutes a violation of the RICO Act, 18 USC 1961, *et seq;*

80. That Plaintiffs have been damaged by this course of conduct, in that on such occasions as they had opportunity to run their horses at the Defendants' tracks, they were deprived of a fair opportunity to win such races, and suffered pecuniary damage and loss of prospective advantage thereby;

81. That Plaintiffs are entitled to treble damages by virtue of 18 USC § 1964;

COUNT XI
DAMAGES

82. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs as though set forth herein in full;

83. That the Plaintiffs, who previously enjoyed a profitable position as breeders, owners and trainers of thoroughbred horses, have had that position entirely destroyed by Defendants, and for the last five years Plaintiffs have been unable to enter horses in thoroughbred horse races in the State of Michigan, by virtue of the misconduct of Defendants, and have had to sustain the cost of maintaining those horses without any revenues to offset those costs, and have sustained other business losses and expenses as a

result of the reduction of the revenue portion of their business as well;

84. That Plaintiffs have suffered humiliation, embarrassment, mortification, and a loss of prestige and position which they previously occupied as respected members of a professional group within this state;

WHEREFORE, Plaintiffs pray that this Honorable Court shall enter judgment in favor of Plaintiffs, and against Defendants, in an amount in excess of $10,000.00.

BEIER, HOWLETT, HAYWARD, McCONNELL, McCANN, JONES, KINSEPP & SHEA
By: s/ P. David Palmiere
P. DAVID PALMIERE (P26796)
Attorney for Plaintiffs
74 W. Long Lake Road, Suite 1
Bloomfield Hills, Michigan 48013
Phone: 645-9400

DATED: JULY 24, 1984

DEMAND FOR JURY

NOW COME the Plaintiffs herein, by and through their undersigned counsel and hereby demand a trial by jury in the above-entitled cause.

BEIER, HOWLETT, HAYWARD, McCONNELL, McCANN, JONES, KINGSEPP & SHEA
By: s/ P. David Palmiere
P. DAVID PALMIERE (P26796)

Appendix E

Attorney for Plaintiffs
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DATED: JULY 24, 1984